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No. 80-6514

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

SAMUEL HAWKINS,

Petitioner,

—v.—

STATE OF TEXAS,

Respondent.

ON WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

MOTION FOR LEAVE TO FILE AND BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI OF THE AMERICAN CIVIL LIBERTIES UNION AND THE TEXAS CIVIL LIBERTIES UNION, AMICI CURIAE

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May 13, 1981

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MOTION FOR LEAVE TO FILE
BRIEF AMICI CURIAE

The American Civil Liberties Union (ACLU) and the Texas Civil Liberties Union (TCLU) hereby jointly move pursuant to Rule 36.1 of this Court's Rules for

le ve to file the attached brief amici curiae in support of the petition for certiorari.

The American Civil Liberties Union is a nationwide, non-partisan organization of over 200,000 members, dedicated to defending the principles embodied in the Bill of Rights. The Texas Civil Liberties Union (TCLU) is one of its state affiliates. The ACLU and TCLU have long opposed the death penalty, and have urged especially careful review of convictions where it may be imposed.

Although we are aware of the Court's general policy disfavoring amicus briefs prior to consideration of the petition for certiorari, and have filed such briefs only in rare circumstances, the extensive involvement of the TCLU below and the special nature of an important issue which was considered below but has

not been raised here have compelled us to urge review.

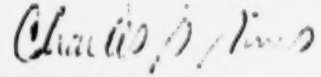
Extensive personal contact between one of the TCLU's cooperating attorneys and petitioner Hawkins prior to the appeal below led the TCLU to conclude that Hawkins' waiver of the right to counsel was not intelligently and competently waived under Westbrook v. Arizona, 384 U.S. 150 (1966) and Rees v. Peyton, 384 U.S. 12 (1966). The TCLU appeared in the Texas Court of Criminal Appeals urging that point, and the court initially agreed, vacating the conviction and remanding for a new trial on the ground that defendant had not been properly advised of the consequences of representing himself. Subsequently, however, the state petitioned for rehearing, joined by the defendant (who asked the court to review other errors but not the claimed incompetent Sixth Amendment

waiver), and the court reversed itself and reinstated the conviction. It did so without remanding for a hearing regarding defendant's competency to represent himself, as required by Westbrook and Rees. The TCLU thereupon moved for reconsideration, submitting a letter from a psychologist who had examined defendant extensively and found him so paranoid as to preclude effective waiver of counsel or capacity for self-representation. The expert concluded that the refusal to accept assistance of counsel was not intelligent or competent, but rather a product of defendant's paranoid thought process. However, the Texas Court of Criminal Appeals denied the motion.

Under these circumstances, we feel a duty to bring the Westbrook - Rees issue to the Court's attention as amici curiae. We urge remand for the hearings

those cases require where, as here, the record so plainly raises serious doubts that the waiver of counsel was effective.

Respectfully submitted,



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BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI OF THE AMERICAN CIVIL LIBERTIES UNION AND TEXAS CIVIL LIBERTIES UNION AMICI CURIAE

QUESTION PRESENTED

Whether a conviction and death sentence for capital murder are consistent with Westbrook v. Arizona, 384 U.S. 150 (1966) and Rees v. Peyton, 384 U.S. 312 (1966) where the Texas courts found defendant had intelligently and competently waived his right to counsel without examining his mental competence to waive

that right, even though the record indicated substantial doubt that he had the capacity to waive counsel or that he understood the special dangers of self-representation in a capital case where the sole defense would be insanity.

Interest of Amici Curiae

The interest of amici curiae appears in the foregoing motion.

Citations To Opinions Below

The opinion of the Texas Court of Criminal Appeals for which review is sought was issued on January 14, 1981, and is reported at S.W.2d (1981). The opinion on original submission, which was vacated by the January 14 opinion, was issued on September 10, 1980 and is reported at S.W.2d (1981).

Jurisdiction

This Court has jurisdiction under 28 U.S.C. §1257(3).

How the Federal Question Was Presented and Decided Below

The Texas Court of Criminal Appeals expressly ruled on the question amici raised here. Appearing amicus curiae, the Texas

Civil Liberties Union filed a brief urging that the record was inadequate to demonstrate an intelligent and competent waiver of his right to representation by counsel. On original submission, the court agreed, and reversed and remanded for a new trial. Subsequently, the issue was again raised and decided, this time adversely, by the Court in its January 14, 1981 decision. The issue was raised again by the TCLU in its motion for rehearing, and rejected on February 4, 1981.

Statement of the Case

Petitioner has asked this Court to review his conviction for the murder of a 12-year old girl during the course of kidnapping and attempted rape. His defense of insanity was rejected by the jury, which subsequently sentenced him to death.

Both at trial[1] and on appeal, petitioner was permitted to represent himself and proceed pro se.

The trial court discerned a question of competency to stand trial and conducted a competency hearing. Rec. Vol. II at 307-335. However, the testimony presented at the hearing was relevant only to a determination of petitioner's competency to stand trial. No separate hearing was held, and no direct evidence was received on the different question of petitioner's competency to waive counsel or his capacity to conduct his own defense. No psychological

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1/ Although the trial court appointed a standby attorney for defendant, that attorney's role was limited pursuant to court instructions [Rec. Vol. I at 138 (references are to statement of facts)], and that attorney at no point in the course of trial actively participated in the presence of the jury.

data was presented at that hearing, or at any other pretrial proceeding, regarding the capacity of petitioner to conduct his own defense or his competence to waive his right to counsel. Moreover, although the court was by then aware that the sole defense to be presented at trial would be insanity, the court made no effort to admonish petitioner as to the special dangers and disadvantages of self-representation in presenting an insanity defense, much less an insanity defense in the context of a capital murder trial involving expert psychiatric testimony and specialized procedures.

The likelihood that petitioner suffered from on-going mental problems is apparent from psychiatric reports written to presiding judges prior to trial [Rec. Vol. X at 1959-1961] as well as testimony at the guilt-innocence stage [Rec. Vol.

IX pp. 1748, 1755-1756, 1771-1772], which contained sufficent evidence of petitioner's depression, poor impulse control, intolerance for anxiety, and delusional system causing episodic insanity to trigger a factual hearing on his ability to waive counsel.

"Q. How is he sick right now?

A. He has very poor impulse control. He has very deep, intense emotions, particularly regarding sexuality and anger and confusion between the two. He goes through episodic depression. He has the [paranoid] delusional system which he can get into, and he has no tolerance for anxiety; that is he has very little tolerance for internal drive and handling and mediating it over time and he has very little tolerance for external pressure and demands." [Rec. Vol. IX pp. 1771-1772, testimony of Dr. Wall]

* * * * * *

"Following this rather extensive workup I came to the conclusion that Samuel Hawkins represents a diagnostic entity, a classic case of true paranoia. By definition, I consider this condition to be an extremely rare condition characterized by the gradual development of an intricate, complex and elaborate paranoid system of thinking and

based on misinterpretation of actual events. Frequently this individual considers himself endowed with unique and superior ability. In spite of a chronic course, this condition does not seem to interfere with the rest of the individual's thinking and personality." [Letter from Dr. Hugh A. Pennal to the Honorable Edward B. Nobles, 12/29/77, Defendant's Exhibit Number 3, Rec. Vol. X. at 1960.]

* * * * * *

"Delusional System: A marked delusional system is apparent which is fully developed ingrained and unquestionable. In this delusional system, whites have oppressed blacks for a long period of time just as the Egyptians oppressed the Jews, so God has appointed some Black people today to help gain the Blacks release from White oppression...

Diagnosis: Although the character is fairly stable otherwise, when his delusional system is energized Samuel Hawkins is psychotic! The diagnosis is paranoia." [Letter from Dr. Richard Lee Wall to Judge Richard N. Countiss, 2/16, 17/78, Defendant's Exhibit Number 2, Rec. Vol. X at p. 1959]

* * * * * *

> "In terms of legal insanity, it is my professional opinion he has had and can have episodes in his life during which he would be judged legally insane. When his anger, depression and sexuality intensify, he simply does not have the defensive capability for rational control." [Letter of Dr. Richard Lee Wall to Judge Countiss, 2/8/78, Defendant's Exhibit Number 4, Rec. Vol. X at p. 1961.]

On original submission to the Texas Court of Criminal Appeals pursuant to contentions advanced by the Texas Civil Liberties Union amicus curiae, the court reversed the conviction and remanded for a new trial "[b]ecause of the failure of the record to reflect a proper waiver of counsel and an informed decision about self-representation." Hawkins v. State, S.W.2d , Slip Opinion, September 10, 1980, at 3 (hereinafter Hawkins I). The court did not find it necessary to reach the further issue raised by amicus regarding petitioner's actual competence to waive counsel or his capacity for self-repre-

sentation, relying instead solely on the insufficiency of "the trial court's admonitions...to meet either the standard for waiver of counsel or the standard enunciated in Faretta [v. California, 422 U.S. 806 (1976)]." The court also necessarily failed to reach the various legal errors petitioner had raised in his pro se brief.

The state petitioned for rehearing seeking affirmance of the conviction. Petitioner joined that petition, urging the court to vacate the order remanding for a new trial and to "rule on the pro se brief", notwithstanding the fact that even if the court were to agree with any of his claimed errors he would have been entitled to no broader relief.

The court granted the state's petition for rehearing, vacated its order, and proceeded to consider (and dismiss)

each of petitioner's remaining claimed errors. Hawkins v. State, S.W.2d , Slip Opinion. January 14, 1981, at 1 (hereinafter Hawkins II). Although it conceded that petitioner's ability to represent himself "has been seriously questioned", id. at 2, the court found that testimony in a subsequent capital case involving this defendant pending in the lower Texas courts, cause No. 65,000, which it judicially noticed, "established conclusively that appellant is well advised as to his right to counsel and the dangers and disadvantages of self-representation, and knowingly and intelligently waived the right and insisted on risking the potential detriment of representing himself." Id. The court reasoned that by joining the State in a Petition for rehearing in this case, petitioner had "in effect concede[d] the errors asserted by the State" in its Appli-

cation for Rehearing. Id. at 3.

In fact, the factual predicate for granting the petition for rehearing -- namely that the hearing in No. 65,000 had established petitioner's knowing and intelligent waiver of his right to counsel -- was not supported by the record, and was erroneous. At no point in the proceedings in Cause No. 65,000, judicially noted in Hawkins II, was psychological or psychiatric data presented on the issue of petitioner's competency to waive counsel or capacity for self-representation. Nor was petitioner advised at that hearing that self-representation raised special risks in the context of an insanity defense or in a capital trial. Indeed, the hearing transcript in No. 65,000 provided additional grounds for doubting defendant's ability intelligently and competently to waive counsel:

(By the Court)

"Q. You have also alleged that your attorneys conspired with the State to promote your conviction. Do you understand that you are assuming matter--stating matters to the Court of Criminal Appeals that would require a high degree of technical experience, expertise to prove. You understand that?

(By Mr. Hawkins)

"A. Judge, the record speaks for itself. There is not a slight problem for me to go through the record and the brief to show you one hundred per cent conspiracy. It's easy. I can easily do it. [Rec. Cause No. 65,000 Hearing on Motion To Dismiss Counsel for Appeal Purposes and to Proceed Pro Se (hereinafter "Hearing") at p. 29]

* * * * * *

(By Mr. Hawkins)

"It is obvious from the record -- it's obvious from [my] attorneys appeal brief that he has deliberately denied my effective assistance of counsel and the State is fully aware of it." [Rec. "Hearing" at p. 44].

(By Mr. Hawkins)

"For the State to sit back and deny me this right was wrong, was flat wrong, and for my attorney to conspire with this type of action, not

only in the course of trial, but in appeal was wrong and I can just go on" [Rec. "Hearing" at pp. 49-50].

* * * * * *

(By Mr. Hawkins)

"In the District Clerk's office, I have a certification slip where she or he or whoever signed it. Not with me, but I indeed have certification slip also that very same brief that I filed in Lubbock County District Attorney's office. Now, again, here's what I'm saying. All this -- this is also one of the procedures that has frustrated me with the system. I don't know whether there has been a conspiracy between you [Mr. Cross] and Verna Boyd, the district clerk here. Somehow he refused to file things I have sent down there. [See "hearing" at p. 93].

The conflict between defendant's testimony in Cause 65,000 and this case, which should have emphasized for the Texas Court of Criminal Appeals the need for a factual hearing on defendant's competence to waive counsel, is evidenced by defendant's confusion in assessing his own competence and sanity. At the hearing in Cause No.

65,000 he disclaimed any history of psychiatric difficulty,[2] even though in this case he had previously filed a pro se motion for a hearing on his competency to stand trial, had given "written notice that the issue of insanity at the time of trial may be raised," Hawkins II at 5-6, and had presented an

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[2] (By the Court)

"Q. Do you make any claim that you are subject to fits of temporary insanity which would interfere with your handling your own appeal?"

"A. Never been evident to me". [Rec. "Hearing" at pp. 19a-20].

* * * * * *

(By Mr. Hawkins)

"A. There is nothing in my background dealing with competency or insanity so that would not affect this situation at all" [Rec. "Hearing" at p. 92].

insanity defense in this case as his only defense.[3/]

Accordingly, on motion for rehearing relying on Rees v. Peyton, 384 U.S. 312 (1966), amicus submitted to the Court of Criminal Appeals the notarized letter of Dr. James Rosen, Ph.D. (attached hereto and made a part hereof as Exhibit "A"), which reads in pertinent part:

> At the request of his estranged wife, I saw Samuel Hawkins professionally while he was incarcerated in the Travis County Jail in Austin, Texas. I met with Sam on four separate occasions (12/14/78, 12/15/78, 12/21/78, 12/27/78) for a total of six hours of clinical interview and psychotherapy. Since that time Sam and I have maintained contact by mail. I have

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3/ Defendant repeatedly insisted in Cause No. 65,000 that he was not raising or was expressly waiving issues of insanity and competency (See Rec. "Hearing" at 86-89, 115-119), but the defense counsel appointed to assist him there inconsistently maintained that defendant was "adamant" in his claims of incompetency and insanity (Id. at 115-119) during the course of trial.

received in excess of fifteen letters from him.

I believe that I have had sufficient contact with Samuel Hawkins to make a clear diagnosis. My diagnosis of him is Paranoia (see DSM-III, 297.10). This is to be distinguished from Schizophrenia of the paranoid type (see DSM-III, 295.3x).

A diagnosis of Paranoia means that while Sam is not prone to hallucinations or incoherence (which are characteristic of Schizophrenia), he is psychotic and incapable of making certain rational choices. His thinking is filled with persistent persecutory delusions. As part of his illness, Sam is totally incapable of trusting people. I am not speaking of distrust in the neurotic sense, where an individual has a difficult time forming close bonds with others. Sam's is a sickness, a psychotic disorder, with a deep distrust which forces him to misinterpret actual events. His mind is then forced to support his own misinterpretations with self-persecutory delusions.

I am somewhat familiar with Sam's case, and I am aware that he demands to act as his own attorney. Should we be surprised by this action? Of course not. How could he do otherwise. He is a psychotic man whose illness totally prevents him from trusting and from accepting the help of any authority.

> It is my professional opinion that Samuel Hawkins does not have the capacity to make a rational decision as to whether or not to represent himself. He will refuse the aid of counsel every time. He must do so. This is part of his particular illness. His rejection of attorneys is a direct expression of his paranoia. [See Exhibit "A" at 1-2].

In February, 1981, the Texas Court of Criminal Appeals denied the motion without opinion.

ARGUMENT

THE COURT SHOULD GRANT THE PETITION FOR CERTIORARI TO DECIDE WHETHER A CONVICTION AND DEATH SENTENCE FOR CAPITAL MURDER ARE CONSISTENT WITH WESTBROOK v. ARIZONA AND REES v. PEYTON, WHERE THE TEXAS COURTS FOUND PETITIONER HAD INTELLIGENTLY AND COMPETENTLY WAIVED HIS RIGHT TO COUNSEL WITHOUT EXAMINING HIS MENTAL COMPETENCE TO WAIVE THAT RIGHT, EVEN THOUGH THE RECORD INDICATED SUBSTANTIAL DOUBT THAT HE HAD THE CAPACITY TO WAIVE COUNSEL OR THAT HE UNDERSTOOD THE SPECIAL DANGERS OF SELF-REPRESENTATION IN A CAPITAL CASE WHERE THE SOLE DEFENSE WOULD BE INSANITY.[4/]

In its first decision in this case, the Texas Court of Criminal Appeals found that the record in this capital murder

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4/ Although this amicus curiae brief is limited to the question of petitioner's competence to represent himself, we believe that petitioner's pro se claim that his confession was involuntary also merits review by this Court.

The transcripts of a tape recording of a portion of the interrogation in this case, received in evidence at the pre-trial suppression hearing, document that petitioner was repeatedly plied with promises of "help" and psychiatric assistance and was led to believe that he was not at fault for his acts because they were the product of a "sickness" akin to a common cold or a per-

(footnote continued on following page)

conviction "was not sufficient to meet either the standard for waiver of counsel or the standard under Faretta: "...[t]he record does not affirmatively reflect appellent's

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(footnote continued from preceding page) son's physical characteristics (See "Supplement" to pro se Petition and appendices annexed thereto.) These statements, made to petitioner after nearly 12 hours of interrogation, might well establish the involuntariness of his confession even if he had not been sentenced to die. However, in the context of this capital case, the police methods revealed by this record present a unique question worthy of review on certiorari.

In a non-capital case the State might argue that the interrogators' statements merely held out the hope of psychiatric help after conviction, in prison or perhaps in a prison mental hospital. But here the State used the confession obtained under these circumstances to seek petitioner's execution -- the very antithesis of "helping" him. To promise a prisoner "help" for his "sickness," and then use the resulting confession to kill him, certainly raises very serious doubts about the voluntariness of that confession. Whether a confession obtained by such methods can survive the test of voluntariness established by this court in analogous situations, see, e.g., Leyra v. Denno, 347 U.S. 556 (1954), Spano v. New York, 360 U.S. 315 (1959), is a question worthy of plenary consideration by this court.

intelligent, voluntary and knowing waiver of representation by counsel." In fact, the record showed not only that deficiency, but in fact disclosed substantial ground for doubting that defendant had the mental capacity to execute an intelligent Sixth Amendment waiver.[5] Nevertheless, after a motion for rehearing in which the defendant joined the state in seeking vacation of the remand for a new trial,[6] the Court of Criminal Appeals vacated its decision, although not its finding, because it believed that the defendant had effectively "conceded" the errors asserted by the State.

5/ See supra at 6-9, 12-15.

6/ The defendant also sought reversal and a new trial on a number of other legal grounds, all subsequently rejected, which he has raised here in his petition for certiorari. Had the Texas Court of Criminal Appeals agreed with any of those grounds, remand for a new trial would have been the most relief defendant could have received.

It did so without holding any hearing, or remanding for one, to inquire into defendant's mental competence to "concede" (or waive) the error, on the basis of a hearing in another case, subsequent to the trial in the case under review, where there was no inquiry into defendant's mental state.

All this occured even though there was a special need for reliability in the procedures for the trial and sentencing phase of defendant's case because this is a capital case[7/], and despite the fact that the sole defense raised at trial was insanity. The conviction and death sentence below procured under these circumstances

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7/ See, e.g., Woodson v. North Carolina, 428 U.S. 280, 305 (1976); Lockett v. Ohio, 438 U.S. 566, 608 (1978); Gardner v. Florida, 430 U.S. 349, 358 (1977); Beck v. Alabama, 447 U.S. 625, 637-38 n.13 (1980).

conflicts with this Court's previous cases involving waiver of counsel by dubiously competent defendants, and in light of defendant's sentence of death warrants review by certiorari.

A. The Decision Below is Directly Contrary to This Court's Holding in Westbrook v. Arizona that Whenever There Is Factual Doubt Concerning A Defendant's Ability to Waive His Right to Counsel in A Capital Case, the Trial Court Should Conduct A Factual Inquiry on That Precise Point.

This court has long distinguished general competence to stand trial from competence to waive the Sixth Amendment right to counsel:

> "One might not be insane in the sense of being incapable of standing trial and yet lack the capacity to stand trial without benefit of counsel."

Massey v. Moore, 348 U.S. 105 at 108 (1954).

In Westbrook v. Arizona, 384 U.S. 150 (1966), the Court concluded that, when raised by the evidence, the trial court must conduct a specific inquiry into the capital defendant's competence to waive the right to an attorney, an obligation not met by a hearing inquiring only into competence to stand trial (384 U.S. at 150):

> Although petitioner received a hearing on the issue of his competence to stand trial, there appears to have been no hearing or inquiry into the issue of his competence to waive his constitutional right to the assistance of counsel and proceed as he did, to conduct his own defense.

The nature of the inquiry the Court required is clear from Rees v. Peyton, 384 U.S. 312 (1966), another capital case, decided just three weeks later, where the Court emphasized the necessarily technical nature of the inquiry into competence to waive the right to counsel and undertake self-representation:

> The question to be answered is whether the defendant has capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation or on the other hand, whetherhe is suffering from a mental disease, disorder or defect which may substantially affect his capacity in the premises.

Rees, supra, 384 U.S. at 314.

The Westbrook Court held that although the defendant who had been sentenced to death had received a hearing on competence to stand trial, the record disclosed substantial doubt that the trial court had fulfilled its "protecting duty" to ensure the waiver of counsel had been intelligent and competent. Accordingly, it vacated the judgment and remanded for further inquiry in the state courts under the general standards of Pate v. Robinson, 383

U.S. 375 (1966).[8/]

Here, as in Westbrook, petitioner was given a hearing as to his competence to stand trial. However, that hearing

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8/ Although Pate involved competence to stand trial, many of its standards for determining effectiveness of waiver are fully applicable to waiver of the right to counsel as well. Nevertheless, it is clear that the standard for effective waiver of counsel is generally higher than the standard for competence to stand trial, since a higher level of functioning may be required to conduct one's own defense than to assist an expert. Compare Dusky v. United States, 362 U.S. 402 with Rees v. Peyton, 384 U.S. at 314. See, e.g., Sieling v. Eyman, 478 F.2d 211, 214 (9th Cir. 1973); United States v. Dougherty, 473 F.2d 1113, 1123 (D.C. Cir. 1972); United States ex rel. Konigsberg v. Vincent, 526 F.2d 131, 133 (2nd Cir. 1975); United States v. Masther, 539 F.2d 721, 726 (D.C. Cir. 1976).

related solely to petitioner's competence to stand trial, that is, his "present ability to consult with his lawyer with a reasonable degree of rational understanding", to understand, rationally and factually, the proceedings against him. Dusky v. United States, 362 U.S. 402 (1960). See, e.g., Rec. Vol. II at 312-313. There was no inquiry regarding defendant's competence at the time of trial to waive the right to counsel, or to conduct his own defense. There was no psychological testimony at any pretrial hearing on his ability to waive counsel or conduct his own defense, which the Court required in Rees. Accordingly, the judgment is in direct conflict with this Court's cases.

The Texas Court of Criminal Appeals attempted to avoid that conclusion by relying on the inquiry conducted in a different capital murder trial involving this defendant, Cause No. 65,000. However,

that hearing took place long after the trial in this case had occured. There was no inquiry in Cause No. 65,000 regarding petitioner's competence to waive counsel in this case, at either the trial level or subsequently on appeal. In fact, as we showed above, see supra at 12-15, the inquiry in Cause No. 65,000 was simply a colloquy between a judge and attorneys unskilled in psychiatric examination and the defendant; no psychological data concerning defendant's mental competence was presented there, either.

Apart from its reliance on a wholly irrelevant inquiry in a different and later case, the state court appeared to rest its second decision on an alternative ground, namely that even if petitioner was incompetent, he had "conceded" (i.e., waived) the error the court had originally found dispositive: the failure to provide defendant sufficient warnings of "the

dangers and disadvantages of self-representation." Slip op. at 2, 3. That ground is equally defective. As this court said in dismissing a similar argument in Pate v. Robinson, supra, where the state had argued that defendant had waived the competence to stand trial issue,

> [I]t is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently "waive" his right to have the court determine his capacity to stand trial.

383 U.S. at 384.

Complying with the rule of Westbrook, the lower courts in the Gary Gilmore, John Evans, and Jesse Bishop cases all carefully inquired into those defendants' competence both to stand trial and waive appellate rights, and this court subsequently relied heavily on those hearings in denying review. See Gilmore v. Utah, 429 U.S. 1012 (1976); Evans v. Bennett, 440 U.S. 1301 (1979) (Rehnquist, Circuit Justice), Lenhard v. Wolff, 443 U.S. 1306 (Rehnquist, Circuit

Justice). As we have shown above, the record here was more than sufficient to trigger the trial court's "protective duty" to make that specialized inquiry required by Westbrook, and which this Court mandated on its own motion in Rees. The failure to do so warrants this Court's review, and remand for the requisite inquiry.[9]

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[9] Although petitioner would be able to file a state habeas corpus petition should this court deny review, the waiver of counsel problem is likely to recur and, in light of the action taken by the Texas Court of Criminal Appeals, infect any subsequent state proceedings. Similarly, we have every reason to believe that petitioner will continue to insist on representing himself on federal habeas corpus. Vacating and remanding the judgment below is required to ensure that petitioner's competence to represent himself is established before any further proceedings take place in this capital case.

B. In Deciding Whether A Defendant Raising An Insanity Defense In a Capital Punishment Case Has Intelligently And Competently Waived His Constitutional Right to Counsel, The Court On Its Own Motion Must Admonish the Defendant That Competent Self-Representation May Prejudice That Defense.

This Court has long stressed that the abandonment of the constitutional right to counsel must be competently and intelligently made, and may not be presumed from a silent record. "Courts indulge every reasonable presumption against waiver of fundamental constitutional rights." Johnson v. Zerbst, 304 U.S. 458, 464 (1938); Carnley v. Cochran, 369 U.S. 506, 514-516 (1962).[10/]

10/ Even as to the less stringent waiver requirements of the Fourth Amendment, regarding the capacity to consent to search, the Court has held that the "traditional definition of voluntariness...has always taken into account evidence of minimal schooling, low intelligence, and the lack
(footnote continued on following page)

More recently, in Faretta v. California, supra, the Court held that at least in the context of self representation, the defendant must be made aware not only of the right sought to be waived as in Johnson v. Zerbst, supra, but also of the consequences of waiving the right to counsel in the sense of knowing the "dangers and disadvances of self representation":

> he should be made aware of the dangers and disadvantages of self representation so that the record will establish that 'he knows what he is doing and his choice is made with his eyes open.'

(footnote continued from preceding page) of any effective warnings to a person of his rights" noting that the "voluntariness of any statements taken under those conditions" must be "carefully scrutinized". Schneckloth v. Bustamonte, 412 U.S. 218, 248 (1973). Here, the trial court noted that defendant was not qualified educationally to represent himself [Rec. Vol. I at p.7]. Moreover, defendant's psychiatric background revealed an extensive history of paranoia and psychosis. [Rec. Vol. IX at pps. 1748, 1755-1756, 1771-1772; Vol. X at pps. 1959-1961]

Faretta v. California, 422 U.S. at 835, quoting from Adams v. United States ex rel. McCann, 317 U.S. 269, 279 (1943).

Neither the record at trial nor in the hearing in Cause No. 65,000 (held long subsequent to trial in this case) shows that the stringent requirements of Faretta have been complied with in light of the substantial prejudice self-representation would have on an insanity defense. Self-representation would by its very nature tend to convey to jurors that the defendant was capable of acting sanely and logically, and would thus prejudice his claim that he was insane and acting illogically at the time of the crime.[11] Especially in a

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11/ In Walker v. Butterworth, 599 F.2d 1074 (1st Cir. 1979), cert. denied 448 U.S. 915, the Court of Appeals reversed a conviction on Fifth Amendment grounds where the trial court, pursuant to traditional Massachusetts practice, had required a defendant (who was represented by counsel) and whose defense (footnote continued on following page)

capital case where insanity was the sole defense, and therefore punishment by death extremely likely if the defense were not believed, such prejudicial impact would be devastating. Under Faretta, therefore, defendant should have been admonished as to the probable prejudicial impact self representation would have on his insanity defense.[12/]

(footnote continued from preceding page) was insanity, to exercise personally his peremptory challenges of prospective jurors. The Court found that personally assisting in an insanity defense to the extent of personally challenging jurors "[a]lmost inevitably carried inferential weight as to [defendant's] past mental condition." 599 F.2d at 1084.

12/ The courts below made no effort to gauge defendant's understanding of jury selection procedures in Texas capital murder trials. Recently §12.31(b) T.P.C. involving jury selection in a capital murder case was overturned by the Supreme Court. Adams v. Texas, U.S. , 65 L.Ed.2d 581 (1980).

Conclusion

Although the issues herein have not been raised by petitioner pro se, they were raised and considered by the courts below, and in any event,

> In exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may of their own motion notice errors to which no exception has been taken, if they otherwise affect the fairness, integrity or public reputation of judicial proceedings.

Silber v. United States, 370 U.S. 717, 718 (1962), quoting U.S. v. Atkinson, 297 U.S. 157, 160.

For the foregoing reasons, Amici Curiae respectfully pray that the petition for a writ of certiorari be granted.

Respectfully submitted,

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May 13, 1981

APPENDIX A

James Rosen, Ph.D.
Clinical Psychologist
Star Route 9, Box 197
Mena, Arkansas 71953

Phone 509-394-3964 January 21, 1981

I wish to submit some information regarding my professional contact with Samuel Hawkins.

I am a licensed clinical psychologist. I received my Bachelor of Science degree from the University of Illinois at Champaign-Urbana, and I received my Ph.D. in clinical psychology from the University of Texas at Austin. I am currently in private practice in Mena, Arkansas. Until moving away from Austin, Texas in May of 1980, I had a full-time private practice there.

At the request of his estranged wife, I saw Samuel Hawkins professionally while he was incarcerated in the Travis County Jail in Austin, Texas. I met with Sam on four separate occasions (12/14/78, 12/15/78, 12/21/78, 12/27/78) for a total of six hours of clinical interview and psychotherapy. Since that time Sam and I have maintained contact by mail. I have received in excess of fifteen letters from him.

I believe that I have had sufficient contact with Samuel Hawkins to make a clear diagnosis. My diagnosis is Paranoia (see DSM-III, 297.10). This is to be distinguished from Schizophrenia of the paranoid type (see DSM-III, 295.3x).

A diagnosis of Paranoia means that while Sam

is not prone to hallucinations or incoherence (which are characteristic of Schizophrenia), he is psychotic and incapable of making certain rational choices. His thinking is filled with persistent persecutory delusions. As part of his illness, Sam is totally incapable of trusting people. I am not speaking of distrust in the neurotic sense, where an individual has a difficult time forming close bonds with others. Sam's is a sickness, a psychotic disorder, with a deep distrust which forces him to misinterpret actual events. His mind is then forced to support his own misinterpretations with self-persecutory delusions.

I am somewhat familiar with Sam's case, and I am aware that he demands to act as his own attorney. Should we be surprised by this action? Of course not. How could he do otherwise. He is a psychotic man whose illness totally prevents him from trusting and from accepting the help of any authority.

It is my professional opinion that Samuel Hawkins does not have the capacity to make a rational decision as to whether or not to represent himself. He will refuse the aid of legal counsel every time. He must do so. This is part of his particular illness. His rejection of attorneys is a direct expression of his Paranoia.

If I am asked to do so, I will testify to the above in a court of law. And I ask that you do not allow this man, Samuel Hawkins, to make this decision to represent himself.

Sincerely,

/s/

James Rosen, Ph.D.
Clinical Psychologist